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JUN 24 2010

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

SYLVIA LEEDS,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No. 6:09cv00061**
	)	
v.	)	
	)	**By: Hon. Michael F. Urbanski**
	)	**United States Magistrate Judge**
JOHN DOE ONE, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the court on a number of outstanding motions. A telephonic hearing was held on the record on June 22, 2010.

1. Plaintiff initially moved for leave to file an amended complaint that dismisses defendant John Doe Two (Docket #47). Plaintiff then filed a second motion to amend (Docket #53), noting that she was withdrawing her initial motion, and seeking leave to substitute Calvin Whitt, an employee of Pendum, LLC,[1] for defendant John Doe Two. Defendant The Kroger Company ("Kroger") represented that it had no objection to plaintiff's second motion to amend.

However, at the hearing, plaintiff's counsel indicated he had no evidence to support a claim against Calvin Whitt and thus could not ethically proceed with this second motion to amend. Plaintiff's counsel stated he would like to withdraw his second motion to amend and proceed with his initial motion to amend, which dismisses defendant John Doe Two from this action. Accordingly, plaintiff's second motion entitled Notice of its Intention to Withdraw its Motion to File an Amended Complaint and Motion for Leave to Substitute Calvin Whitt for John

[1] Pendum, LLC was dismissed as a named defendant in this case by Order dated May 19, 2010, in which the court granted plaintiff and Pendum's joint motion for voluntary dismissal.

Doe Two and to Amend its Complaint (Docket #53) is **DENIED as moot**. Plaintiff's Motion for Leave to File an Amended Complaint (Docket #47) is **GRANTED**.

2. Kroger moved to exclude (Docket #49) the four medical experts designated by plaintiff on the issue of causation: Jessica Longfors (physical therapist), Dr. Thuan T. Nguyen (emergency room physician), Dr. Jack I. Lu (treating physician), and Dr. Robert W. Sydnor. Given the arguments made by Kroger in this pending motion, plaintiff moved to amend her expert witness disclosure to include plaintiff's primary care physician, Dr. J. Scott Wade, and to reopen discovery to permit defendant to depose Dr. Wade (Docket #57). At the hearing, counsel for plaintiff explained that he was surprised to learn through deposition testimony that neither Dr. Nguyen nor Dr. Lu related plaintiff's vertigo, a significant component of plaintiff's damages claim, to the injuries she sustained as a result of the incident in question.[2] Counsel subsequently discovered that Dr. Wade does relate plaintiff's vertigo to the incident, and therefore, seeks leave to amend plaintiff's expert disclosure.

Plaintiff has provided the court with good reason for not disclosing Dr. Wade by the deadline set forth in the pretrial scheduling order, and the court finds that justice would be served by permitting plaintiff to amend her expert disclosure accordingly. As such, plaintiff's Motion to File an Amended Expert Witness Disclosure and Motion to Amend the Pre-trial Order to Permit the Defendant to Depose the Named Expert (Docket #57) is **GRANTED**. Plaintiff is permitted to identify Dr. Wade as an expert witness provided that plaintiff can arrange for Dr. Wade to be deposed within **thirty (30) days**.

Kroger's Motion to Exclude Expert Testimony (Docket #49) is taken under advisement and will be resolved by the trial judge at a later date.

[2] Although plaintiff's physical therapist Jessica A. Longfors apparently relates plaintiff's vertigo to the incident, Kroger argues she is not qualified to testify as to vertigo under Virginia law.

3. Plaintiff filed a motion in limine concerning contents of an alleged videotape of the incident in question (Docket #58). This motion is noted on the docket to have been filed ex parte. Kroger has not received notification of this filing and does not have access to this motion on the docket. Plaintiff's counsel represents that this motion was not intended to be filed ex parte and any such notation on the docket was made in error at the time of filing. Therefore, the Clerk is **DIRECTED** to remove the ex parte notation from docket entry 58, refile plaintiff's motion in limine, and provide electronic notification of and access to this motion to Kroger. The merits of this motion in limine will be resolved by the trial judge at a later date.

4. The parties filed a Joint Motion to Continue Hearing on Dispositive Motions (Docket #61), seeking a continuance of the summary judgment hearing scheduled for Friday, June 25, 2010 until the settlement conference scheduled for July 21, 2010 has been held. Given the court's ruling on the above motions, Kroger indicated at the hearing that it was withdrawing its consent to a continuance and wished to proceed with summary judgment this week. The issues have been fully briefed, and the undersigned sees no reason why the parties cannot proceed on the summary judgment motions as scheduled. Therefore, the motion for continuance (Docket #61) is **DENIED**. The parties are **DIRECTED** to appear before the trial judge in Lynchburg on **Friday, June 25, 2010 at 11:00 a.m.** for summary judgment arguments.

It is **SO ORDERED**.

The Clerk of the Court hereby is directed to send a copy of this Order to counsel of record.

Entered: June 24, 2010.

/s/ Michael F. Urbanski

Michael F. Urbanski
United States Magistrate Judge